

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

CAPELLO *et al.*,

Plaintiffs,

v.

SELING, *et al.*,

Defendants.

Case No. C02-5242RBL

REPORT AND  
RECOMMENDATION  
REGARDING  
RICARDO CAPELLO

**NOTED FOR:  
December 23<sup>rd</sup>, 2005**

This Civil Rights action has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). Before the court is a summary judgment motion filed by defendants. There are five defendants named in this action. They are, Dr. Mark Seling, Dr. Robert Smith, Dr. Vince Gollogly, Lyle Quasim, and Dennis Braddock. This Report and Recommendation deals only with the claims of Ricardo Capello.

PROCEDURAL HISTORY

Defendants filed a large number of summary judgment motions during July of 2004. The dispositive motion cut off date was July 30<sup>th</sup>, 2004. (Dkt. # 195). The motions were all supported by a general brief and declarations, (Dkt. # 229 and 230 through 242). On July 27<sup>th</sup>, 2004, defendants filed a memorandum specific to Mr. Capello. (Dkt. # 312). There are supporting declarations which set forth the mental health treatment available and issues specific

1 to Mr. Capello. (Dkt. # 312 through 314).

2 On August 11<sup>th</sup>, 2004 plaintiffs filed a single response to all the summary judgment  
3 motions. (Dkt. # 404). Plaintiff supports his response with a number of declarations. (Dkt. #  
4 405 through 421). Mr. Capello has filed a declaration specific to himself. (Dkt. # 405). The  
5 defendants reply addresses each claim raised and urges the court to grant summary judgement  
6 as plaintiff Capello has failed to submit any specific evidence showing a genuine issue of  
7 material fact. (Dkt. # 389).

#### 8 FACTS AND CLAIMS

9 This action is one in a series of legal actions regarding the Special Commitment Center  
10 (SCC). Plaintiffs challenge the mental health treatment provided and conditions of confinement.  
11 The plaintiffs are all persons confined for mental health treatment. The SCC is designed to treat  
12 persons whose mental abnormalities or personality disorders make them likely to engage in  
13 predatory acts of sexual violence. (Dkt. # 229, page 3).

14 For over a decade the SCC has operated under federal oversight as a result of  
15 injunctions issued by the United States District Court in Seattle. The court found the conditions  
16 of confinement in 1991 unconstitutional and found the mental health treatment offered at that  
17 point in time to be inadequate. Turay v. Seling, C91-0664RSM. There have been high and low  
18 points during the years of oversight including findings of contempt, and findings that portions of  
19 the injunction had been fulfilled. On June 19<sup>th</sup>, 2004 the court found the defendants in  
20 substantial compliance and lifted the injunctions with one exception. Turay v. Seling, C91-  
21 0664RSM (Dkt # 1906).

22 This plaintiff, Mr. Capello, was first sent to the SCC as a pre-trial detainee on August  
23 6<sup>th</sup>, 2001. (Dkt. # 312, Exhibit 1, Deposition of Capello, page 10). His criminal conviction  
24 history includes 1982 convictions from Hawaii for first degree sodomy and sexual abuse and a  
25 1991 conviction by Alford plea for first degree kidnaping with sexual motivation. (Dkt. # 312,  
26 Exhibit 2).

1 When Plaintiff first arrived at the SCC he signed forms authorizing treatment. He  
2 contends he signed those forms under duress and he has consistently refused treatment. (Dkt. #  
3 312, Exhibit 1, Deposition of Capello, page 26 to 38). Despite his conviction history plaintiff  
4 maintains he does not need sexual deviancy treatment. (Dkt. # 312, Exhibit 1 Deposition of  
5 Capello, page 26). Plaintiff has indicated he intends to litigate his way out of the program.  
6 (Dkt. # 312, Exhibit 1, page 26).

7 Mr. Capello has received medical treatment for a number of issues including an unstable  
8 ankle and Hepatitis C and has been repeatedly tested for long term changes to his system as a  
9 result of his medical condition. (Dkt. # 314, attached medical record). While he challenges the  
10 adequacy of the medical treatment he provides no evidence to show he has suffered any injury  
11 or that any named defendant provided medical treatment. Plaintiff is employed in a kitchen  
12 custodial position. (Dkt. # 312, Exhibit 1, Deposition of Capello).

13 The defendants represent Mr. Capello's diagnosis as sexual sadism with a separate  
14 diagnosis of antisocial personality disorder. (Dkt. # 312, page 2, citing to Exhibit 2). A careful  
15 reading of the exhibit shows that plaintiff had a diagnosis on Axis I of sexual sadism, alcohol  
16 abuse, and poly substance abuse and an Axis II diagnosis of antisocial personality disorder,  
17 however the mental health expert who did the review for defendants disputes the diagnosis of  
18 antisocial personality disorder and believes instead that plaintiff suffers from the far more  
19 serious condition of psychopathic personality disorder. (Dkt. # 312, Exhibit 2). Dr. Richards  
20 diagnosis is Axis I sexual sadism, alcohol abuse, poly substance dependence, paraphilia, not  
21 otherwise specified, non consent rape and Axis II psychopathic personality disorder. (Dkt. #  
22 312, Exhibit 2, page 6).

23 The defendants submitted the declaration of Dr. Jason Dunham, a licensed psychologist,  
24 who is of the opinion that the treatment available to plaintiff provides plaintiff with an  
25 opportunity to improve the conditions for which he is committed. (Dkt. # 313). The Plaintiff  
26 has not contradicted the factual representations or assertions made by defendants and instead  
27

1 argues he has no sexual deviancy and wants treatment for the mental abnormalities for which he  
2 is confined. (Dkt. # 312, Exhibit 1, Deposition of Capello pages 34 to 38). Mr. Capello does  
3 not specify what those condition are except to mention the antisocial personality disorder  
4 diagnosis which is in question, as noted above.

5 Defendants' motion for summary judgement is very specific. Defendants seek summary  
6 judgment because the complaint does not "accurately represent each plaintiff's claims, and  
7 because **each plaintiff must demonstrate the merit of his own claims to go forward**". (Dkt.  
8 # 229)(emphasis added). Defendants ask for summary judgment based on the Eleventh  
9 Amendment, qualified immunity, personal participation, and lack of a constitutional violation.  
10 (Dkt. # 229, pages 18 through 37). In essence, defendants argue that none of the plaintiffs can  
11 show an injury of constitutional magnitude specific to that plaintiff.

12 Plaintiff places great weight on the findings of fact made in Turay v. Seling, and other  
13 cases without a showing that the findings apply to him. Thus, Mr. Carello continues to argue  
14 this action in the abstract. By way of example, he argues damages are "best weighed by  
15 everyday spent without constitutionally adequate mental health treatment and more considerate  
16 conditions of confinement than prisoners." (Dkt. # 404, page 6). Mr. Capello has no evidence  
17 to support his assertions that the treatment offered him by any named defendant is in any way  
18 inadequate. Plaintiff's response does not address defendants position, the requirement of a  
19 specific evidentiary showing.

20 Plaintiff does raise an issue of confidentiality and alleges he was asked to participate in  
21 one on one sessions in a crowded day room, but plaintiff does not implicate any named  
22 defendant as having participated or authorized this conduct and he does not show that  
23 confidential material was discussed. (Dkt. # 312, Exhibit 1, Deposition of Capello, page 28 and  
24 29).

25 Two of the named defendants in this action, Lyle Quasim and Dr. Robert Smith left their  
26 position with the state prior to August 6<sup>th</sup>, 2001, when Mr. Capello first arrived at the Special  
27

1 Commitment Center. (Dkt. # 242, Declaration of Beverly Wilson ¶¶ 2,3,and 5). Further,  
 2 plaintiff admits he has never had any personal contact with Dennis Braddock. (Dkt. # 312,  
 3 Exhibit 1, Deposition of Capello, page 66). When asked if either defendant Gollogly or Seling  
 4 had ever violated his rights plaintiff indicated they had not but that they were sued based on  
 5 their position and allowing the day to day operations from a “clinical point.” (Dkt. # 312,  
 6 Exhibit 1, Deposition of Ricardo Capello page 66 and 67).

#### 7 THE STANDARD

8 Pursuant to Fed. R. Civ. P. 56 (c), the court may grant summary judgment “if the  
 9 pleadings, depositions, answers to interrogatories, and admissions on file, together with  
 10 affidavits, if any, show that there is no genuine issue of material fact and that the moving party  
 11 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56 (c). The moving party is entitled  
 12 to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on  
 13 an essential element of a claim on which the nonmoving party has the burden of proof. Celotex  
 14 Corp. v. Catrett, 477 U.S. 317, 323 (1985).

15 There is no genuine issue of fact for trial where the record, taken as a whole, could not  
 16 lead a rational trier of fact to find for the nonmoving party. Matsushita Elec. Indus. Co. v.  
 17 Zenith Radio Corp., 475 U.S. 574, 586 (1986)(nonmoving party must present specific,  
 18 significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed. R. Civ.  
 19 P. 56 (e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence  
 20 supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions  
 21 of the truth. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 253 (1986); T. W. Elec. Service  
 22 Inc. v. Pacific Electrical Contractors Association, 809 F.2d 626, 630 (9<sup>th</sup> Cir. 1987).

23 The determination of the existence of a material fact is often a close question. The court  
 24 must consider the substantive evidentiary burden that the nonmoving party must meet at trial,  
 25 e.g. the preponderance of the evidence in most civil cases. Anderson, *supra* at 254; T.W. Elec.  
 26 Service Inc., *supra* at 630. The court must resolve any factual dispute or controversy in favor

1 of the nonmoving party only when the facts specifically attested by the party contradicts facts  
2 specifically attested by the moving party. T.W. Elec. Service Inc., supra at 630.

3 The nonmoving party may not merely state that it will discredit the moving party's  
4 evidence at trial, in hopes that evidence can be developed at trial to support the claim. T.W.  
5 Elec. Service Inc., supra at 630. (relying on Anderson, supra). Conclusory, nonspecific  
6 statements in affidavits are not sufficient, and "missing facts" will not be "presumed." Lujan v.  
7 National Wildlife Federation, 497 U.S. 871, 888-89 (1990).

8 In addition, the court is mindful that an action for injunctive relief focuses on whether  
9 the combined acts or omissions of state officials violate a constitutional right or duty owed the  
10 plaintiff. In contrast, when a plaintiff seeks to hold a defendant personally liable the inquiry into  
11 causation is more specific and focuses on that persons specific actions. Leer v. Murphy, 844 F.  
12 2d. 628, 632 (9<sup>th</sup> Cir. 1988).

### 13 DISCUSSION

14 The plaintiffs' reliance on Turay and other SCC injunctive relief cases is misplaced. The  
15 holdings in those cases do not equate to findings of liability for damages against any named  
16 defendant. This is because of the difference in standards of proof between actions for injunctive  
17 relief and actions for damages. This difference was briefed by defendants who stated:

18 As Judge Leighton explained in a similar case: "Turay has no talismanic  
19 quality, the mere invocation of which conjures a cause of action." Hoisington, et  
20 al. v. Seling, et al., No. C01-5228-RBL, October 28, 2003, Order at 6 (dkt. #  
21 189). Turay is of assistance to plaintiffs in this case only if (1) they are able to  
22 identify a specific ruling from Turay that, for qualified immunity purposes, was  
23 sufficient to put defendants on notice that their conduct potentially violated  
24 plaintiffs' constitutional rights; or (2) they can point to a specific factual finding  
25 from Turay that could apply by way of collateral estoppel. In either case, each  
26 plaintiff must first show how a specific ruling or finding from Turay applies to his  
27 situation and establishes a violation of his constitutional rights. In doing so, each  
28 plaintiff must be aware that relief ordered in Turay does not represent the  
constitutional minimum. See Sharp v. Weston, 233 F.3d 1166, 1173 (9th Cir.  
2000) ("A court may order 'relief that the Constitution would not of its own  
force initially require if such relief is necessary to remedy a constitutional  
violation.'"). In Sharp, the Ninth Circuit specifically noted that Judge Dwyer's  
findings in Turay did not imply the existence of constitutional rights. Thus, for  
example, Judge Dwyer's order that SCC provide residents private visitation  
rooms and educational opportunities did not mean that the residents had a

1 constitutional entitlement to those things. Id.  
2 (Dkt. # 229, pages 21 and 22).

3 The defendants filed a separate motion for summary judgment for each plaintiff that sets  
4 forth the treatment provided or available to that person and that persons factual history. The  
5 summary judgement standard requires plaintiff to “present specific, significant probative  
6 evidence.” Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986).

7 Mr. Capello was informed of the summary judgment standard. (Dkt. # 195). The court  
8 specifically informed plaintiff that if the opposing party moved for summary judgment he would  
9 need to:

10 **[s]et out specific facts in declarations, deposition, answers to**  
11 **interrogatories, or authenticated documents, as provided in Rule 56(e), that**  
12 **contradict the facts shown in the defendant’s declarations and documents**  
13 **and show that there is a genuine issue of material fact for trial. If you do**  
14 **not submit your own evidence in opposition, summary judgment , if**  
15 **appropriate, may be entered against you. If summary judgment is granted,**  
16 **your case will be dismissed and there will be no trial.**

17 Rand v. Rowland, 154 F.3d 952, 962-963 (9<sup>th</sup> Cir. 1998)(emphasis added).  
18 (Dkt. # 195). (emphasis in original order). Mr. Capello has failed to come forward with any  
19 evidence to show that any right or duty owed to him has been violated by any named defendant,

20 Mr. Capello challenges room searches performed without a warrant but he fails to show  
21 that any named defendant ever searched his room. Further, he fails to show the searches are  
22 unreasonable given that he is housed by law in a secure facility where items such as  
23 pornography are considered contraband.

24 Mr. Capello challenges not being allowed to order R-rated movies but fails to show the  
25 policy decision not to allow movies with such a rating is not treatment oriented. Mr. Capello  
26 also complains of the treatment he allegedly received from Department of Corrections personnel  
27 or inmates while the Special Commitment Center was housed inside the Mc Neil Island  
28 Correctional facility and he complains of the treatment he received from Department of  
29 Corrections personnel when he left and returned to the McNeil Island on a number of occasions

1 for medical treatment.. Mr. Capello fails to show any named defendant participated in or  
2 condoned the alleged misconduct. Personal participation is the crux of a damage claim in a civil  
3 rights action. Leer v. Murphy, 844 F. 2d. 628, 632 (9<sup>th</sup> Cir. 1988). A defendant cannot be held  
4 liable under 42 U.S.C. § 1983 solely on the basis of supervisory responsibility or position.  
5 Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 n.58 (1978). A theory of  
6 *respondeat superior* is not sufficient to state a claim under 42 U.S.C. § 1983. Padway v.  
7 Palches, 665 F.2d 965 (9th Cir. 1982).


8 Mr. Capello's allegations are unsupported by any evidence that shows he has suffered  
9 any injury attributable to the conduct of the defendants. The defendants are entitled to summary  
10 judgment as a matter of law.

#### 11 CONCLUSION

12 Defendants are entitled to summary judgment as plaintiff has failed to show a  
13 any injury. Defendants motion for summary judgment should be **GRANTED**. A proposed order  
14 and proposed judgment accompanies this Report and Recommendation.

15 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
16 Procedure, the parties shall have ten (10) days from service of this Report to file written  
17 objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those  
18 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
19 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on  
20 **December 23<sup>rd</sup>, 2005**, as noted in the caption.

21 DATED this 2<sup>nd</sup> day of December, 2005.

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24 Karen L. Strombom  
25 United States Magistrate Judge  
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